U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

D7

[redacted]

FILE: SRC 03 055 50046 Office: TEXAS SERVICE CENTER Date: AUG 16 2004

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of president and general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Florida and claims to be an import, export, investment, and business management operation. The petitioner states that it is the wholly owned subsidiary of Hermanos Medico, C.A., located in Venezuela. The petitioner seeks to employ the beneficiary for an initial stay of three years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel disputes the director's findings and indicates that an additional brief will be submitted 30 days from the date of the filing of the appeal. However, more than one year has passed since the appeal was filed and counsel has not submitted any additional information in support of the appeal. Therefore, the record is considered complete as currently constituted.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulations at 8 C.F.R. § 214.2(l)(3) state that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States.

At issue in this proceeding is whether the petitioner has established that the beneficiary would be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
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> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
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> iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily-
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
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> iii. exercises wide latitude in discretionary decision-making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In Section 1 of the supplement to the I-129 petition, the petitioner stated that the beneficiary's duties would consist of "administration and management of [the] U.S. subsidiary, negotiat[ing] new contracts, hir[ing] new employees and day to day supervision [of the] company." In Part 5 of the petition the petitioner indicated that it currently has one employee.

On December 30, 2002, CIS issued a request for additional evidence. The petitioner was instructed to provide evidence of its current staffing levels, including the position titles and duties of all of its employees. The petitioner was also asked to provide several of its 2002 quarterly tax returns, along with an explanation of why Schedule K of the submitted income tax returns did not show any foreign ownership or wages paid.

In response, counsel provided a statement, dated March 14, 2003, stating that in an effort to minimize "unnecessary expenses" the petitioner has been using independent contractors pending CIS's approval of the petition. Counsel states that permanent employees will eventually be hired by the beneficiary once his petition is approved. Counsel further claimed that failing to indicate the petitioner's foreign ownership on the tax return was an error of the accountant who completed the tax form. Counsel stated that an amended tax return would be submitted to reflect the foreign company's sole ownership of the petitioning entity.

On March 26, 2003 the director denied the petition noting that even though the petitioner has been operating since 1996, it currently has no employees. The director concluded that the petitioner has failed to submit sufficient evidence to establish that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel states that "[d]uring his tenure as president/[g]eneral [m]anager [the beneficiary] has managed the organizations [sic] U.S. development" suggesting that the beneficiary has already commenced his employment in the United States. As the petition had been previously denied, thereby giving rise to the present appeal, counsel's claim that the beneficiary has been managing the U.S. entity's operations is questionable and should have been explained further in the context of the present circumstances.

Counsel also asserts that the small size of the petitioner's personnel does not prevent the beneficiary from acting in a managerial or executive capacity and states that the director erred in basing the denial on the size of the petitioner's personnel. However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In the instant case, the petitioner has maintained the claim that it has independent contractors to actually carry out the non-qualifying operational tasks on a day-to-day basis. Despite this claim, the petitioner has submitted absolutely no information regarding the tasks these independent contractors purportedly perform; nor is there evidence in the record that would support the petitioner's claim to having hired independent contractors. To the contrary, Schedule A of the petitioner's 2001 Federal Tax Return, Form 1120 suggests that no amount of money was paid for cost of labor; nor does the record contain any Forms 1099 to indicate that the petitioner paid any miscellaneous income to individuals who were not directly employed by the petitioner. It is noted that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, the statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Finally, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In the instant case, the petitioner has failed to provide a concrete description of the beneficiary current or proposed job duties. As such, it is impossible for the AAO to affirmatively determine that the beneficiary would primarily perform qualifying duties, particularly in light of the lack of evidence on record to show that the petitioner has a sufficient

support staff, either contractual or permanent, to relieve the beneficiary from having to engage in non-qualifying duties. We note that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or would be employed in a primarily managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he would otherwise be relieved from performing non-qualifying duties. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary would primarily manage an essential function of the organization or operate at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the record does not contain sufficient evidence to support the petitioner's claim that it is owned by a foreign organization. The regulation at 8 C.F.R. § 214.2(l)(3)(i) requires that the petitioner and the beneficiary's foreign employer have a qualifying relationship as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner was informed by the director in the request for additional evidence that the petitioner's tax returns contradicted the petitioner's claim to foreign ownership. Counsel responded to the request by claiming that the contradictory information in the petitioner's tax returns was the result of the accountant's error and stated that an amended tax return would be submitted to clear up the alleged error. However, counsel has failed to produce any evidence to support his claim that any of the information in the previously submitted tax returns was erroneous. As previously stated, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. It is noted that an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). As such, due to the additional grounds discussed in this paragraph, this petition cannot be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.